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December 8, 2004

Via Electronic Submission

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Notice of Ex Parte – Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338**

Dear Ms. Dortch:

On behalf of SBC Communications, Inc. ("SBC"), I am writing to respond to the November 23, 2004 ex parte letter by CompTel/ASCENT.[1] This letter – which takes issue primarily with ILEC evidence regarding the viability of special access as a means to compete in the enterprise market – misrepresents the evidence in the record not only about how much CLECs must pay for special access, but also about how they are using it to compete. And the conclusion it draws – that the American economy will suffer to the tune of billions of dollars and hundreds of thousands of jobs unless CLECs get a massive price break on services they are already purchasing as special access – is directly contrary to the judgment of the very businesses that CompTel/ASCENT are purporting to defend.

1. The bulk of the CompTel/ASCENT letter is directed at ILEC evidence showing that, along with CLEC reliance on self-provided or third-party facilities, CLECs can and do use special access circuits to meet their high-capacity transmission needs, and

[1] *See* Letter from Jonathan Lee, CompTel/ASCENT, to Marlene H. Dortch, FCC, WC Docket No. 04-313 and CC Docket No. 01-338 (Nov. 23, 2004) ("CompTel/ASCENT Letter").

that, as a result, CLECs are not impaired without UNE access to those same facilities. In CompTel/ASCENT's view, this evidence fails properly to characterize the evidence in the record regarding special access pricing trends.[2]

As an initial matter, however, CompTel/ASCENT's claims are beside the point. As the Supreme Court and the D.C. Circuit have made clear, the purpose of unbundling is not to ensure low rates or maximum profits for CLECs; to the contrary, unbundling is appropriate only to the extent competition cannot exist without it.[3] CompTel/ASCENT do not even attempt to show that competition cannot exist without high-capacity loop unbundling. That is because they cannot make such a showing. Competition for medium and large business customers – that is, for those customers that use high-capacity loops, including DS1 loops – is thriving today, with SBC making up approximately 5% of the overall market. And that is so *despite* the fact that – as SBC has shown without *any* rebuttal from *any* party – the vast majority of DS1 facilities used by competitors are their own facilities, those of third-party providers, or ILEC special access. Indeed, over 75% of the more than 500,000 DS1s that SBC sells to CLECs are sold as special access, not UNEs, and more than 90% of SBC's special access sales are made to wholesale customers. What is more, no fewer than twenty-five CLECs rely almost *exclusively* on special access to compete in larger business markets. Each and every one of these carriers purchases more than 97% of their DS1s as special access. And, collectively, these CLECs purchase more than 98% of SBC's special access DS1s. In light of this undisputed evidence, it is simply impossible for the CLECs to contend, or for the Commission to conclude, that competition is impaired without UNE access to high-capacity transmission facilities. To the contrary, the actions in the marketplace of numerous CLECs prove otherwise, and competition is *already* thriving without such access.

Given this unrefuted evidence that demonstrates beyond question that CLECs can and do compete without UNEs, CompTel/ASCENT can only rely on arguments that are mere distractions. Their myopic focus on price trends utterly ignores the fact that, in competitive markets, prices move up and down, not just down. Given that a price increase does not even show a lack of existing competition, it certainly does not say anything about the viability of potential competition – which is the touchstone for unbundling.

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[2] *See id.* at 1-2.

[3] *See*, *e.g.*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*") (emphasizing that unbundling is warranted only where the Commission "ha[s] . . . reason to think doing so would bring on a significant enhancement of competition").

In any event, CompTel/ASCENT's arguments with respect to special access pricing trends are not only irrelevant, but also misleading and incorrect. Their primary claim is that SBC's showing of "average" DS1 special access rate declines is irrelevant, because that "average" decline is – or at least might be – attributable to *mandatory* rate reductions in price cap areas (rather than to competitive forces in pricing flexibility areas).[4] But, even apart from the fact that a price increase over time cannot show impairment where CLECs themselves are relying on the facilities in question, CompTel/ASCENT's speculative assertion cannot be squared with the facts. Over half of SBC's special access revenue comes from MSAs with Phase II pricing flexibility, and at least three-quarters comes from areas with Phase I or II pricing flexibility. Indeed, CompTel/ASCENT concede the point, explaining that "most special access circuits are purchased at . . . *pricing flexibility* rates," rather than at "*price cap* rates."[5] SBC's average DS1 rate throughout its territory has declined by fully 14% in the past three years. If the decline in average DS-1 rates were attributable solely to mandatory reductions in price cap areas, those reductions would have had to be approximately 30%, which plainly was not the case. In fact, under CALLS, SBC had no reductions in price caps areas in its 2004 annual filing.[6] Moreover, the 14% decline referred to above reflected SBC's average DS-1 rates as of August 2004. Since then, SBC's average DS-1 rate has declined by an additional 2-3%. On these facts, it is simply impossible to conclude, as CompTel/ASCENT assert, that the entirety of SBC's 14% reduction in average DS-1 rates over the past three years is attributable to non-pricing flexibility areas.

CompTel/ASCENT next claim that a decline in the average *revenue* that SBC receives per DS1 circuit does not necessarily demonstrate a decline in *rates*. In their view, such a decline may reflect, not a change in rates *per se*, but rather a change in the pricing plans that customers use to purchase DS1s.[7] This claim is nothing short of bizarre. The question at issue here is whether special access presents a viable mode for competing in the enterprise market – as SBC contends and the evidence reveals – or whether instead the prices for special access are too expensive and unconstrained (either by competition or regulation) to allow CLECs to compete. In addressing that question, the rates that CLECs *actually pay* is far more relevant than the rates that they do not. And, again, CompTel/ASCENT ultimately concede the point, stressing the importance of the "actual prices charged . . . in pricing flexibility areas."[8]

CompTel/ASCENT also attempt to explain away the record evidence of special access price declines by speculating about changes in the distance of the circuits that CLECs buy. Special access rates are mileage sensitive, they explain, and the fact that CLECs are paying less today for the same number of circuits may simply reflect the fact that they are purchasing shorter circuits.[9] This claim, however, is doubly flawed. First, as

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[4] *See* CompTel/ASCENT Letter at 2.

[5] *Id.* at 5 (emphasis in original).

[6] SBC notes, in this regard, rates in price cap areas were increased slightly in the 2004 annual filing.

[7] *See id.* at 2.

[8] *See id.* at 3.

[9] *See id.* at 2.

a theoretical matter, if CLECs are able to pay less for DS1 circuits because they are purchasing shorter circuits, so much the better. That establishes only that CLECs have been able to design their networks more efficiently and thereby reduce special access mileage charges, thus confirming the viability of special access as a means to compete. Second, and in any event, contrary to CompTel/ASCENT's conclusory assertion, SBC *did* consider actual mileage when it calculated the average DS1 rates reflected in the record, thus establishing that DS1 special access rates have declined not just on a per-circuit basis, but also on a per-mile basis.

Apart from their speculative and misplaced challenges to ILEC evidence of special access price declines, CompTel/ASCENT also take aim at the terms under which SBC makes available its deepest special access discounts. But, here again, these claims – which are by and large a restatement of claims that have already been raised and refuted in this proceeding[10] – are based on willful mischaracterizations of the evidence in the record.

Thus, for example, while conceding the falsity of the CLECs' recurrent claim that SBC's MVP plan requires CLECs to devote *all* of their traffic to SBC, CompTel/ASCENT nevertheless take issue with the fact that, in order to be eligible for SBC's deepest discounts, a carrier must maintain, on a year-over-year basis, the volumes it purchases under MVP.[11] In their view, this feature ensures that, "even when competitive alternatives exist, a carrier-customer purchasing special access under MVP cannot economically use them."[12] This contention is not only a red herring but contrary to the evidence in the record. As an initial matter, MVP is but one of many deep discount options available to CLECs. For example, as SBC has previously noted (and as its interstate tariffs on file at the Commission demonstrate), carriers may obtain discounts of more than 40% off month-to-month rates by committing to a three- or five-year term plan. Those term plans require *no volume commitments whatsoever*. While MVP customers may obtain additional discounts of 9-14% under the current MVP tariff, it is hardly surprising that the very deepest discount available should require some volume commitment. Importantly, those volume commitments are based on *prior* purchase volumes; they do not require carriers to grow their purchases one iota. Indeed, MVP gives CLECs even *more* flexibility than an ordinary term contract, since it allows the customer to choose *which* circuits it will purchase as special access, and thus permits it to take advantage of competitive opportunities wherever they arise. And the proof of that – which CompTel/ASCENT utterly ignore – is in the record. As SBC has explained,[13] in the last two years, one of SBC's largest MVP customers has moved ***** [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]***** from special access circuits provided by SBC to competitive facilities, even as it has voluntarily ***** [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]*****. This conduct squarely rebuts CompTel/ASCENT's conclusory

[10] *See*, *e.g.*, Ex Parte Letter of Gary Phillips, SBC, to Marlene Dortch, FCC, WC Docket No. 04-313 and CC Docket No. 01-338 (Nov. 5, 2004).

[11] *See* CompTel/ASCENT Letter at 4.

[12] *Id.*

[13] *See* SBC Reply Comments at 48-49.

assertion that MVP somehow prevents CLECs from taking advantage of competitive facilities.

Relatedly, AT&T recently objected to the concept of term discounts generally, arguing that "the ability of a CLEC to take advantage of a term plan discount for special access is limited by its ability to convince its retail customers to agree to a retail purchase contract of equal length."[14] But no one is forcing AT&T to take advantage of term discounts. If it wants the flexibility that comes with purchasing special access on a month-to-month basis, it is free to do so. In any case, the Commission itself has observed that enterprise customers, including small and medium size customers, "are willing to sign term contracts."[15] It is presumably for this reason that, notwithstanding this so-called constraint, the CLECs' use of special access – and AT&T's use in particular – has been so unconstrained.[16]

Equally off-base is CompTel/ASCENT's claim that an SBC special access tariff – SBC Contract Tariff § 22.20.3(c) – operates to foreclose CLECs from using competitive facilities by using a "bounty" to encourage special access customers to migrate their traffic to SBC.[17] As an initial matter, there is nothing unlawful about encouraging customers to switch their business from a competitor. The telecommunications market in general – and the special access and enterprise markets in particular – is fiercely competitive, and those carriers that don't try to win business from their competitors by all lawful means will die a quick death. In any event, the tariff provision on which CompTel/ASCENT rely – which was entirely optional for MVP customers – was only available to customers in 2003, for a grand total of 60 days. During that time, exactly *one* customer took advantage of the offer. Plainly, this competitive inducement has had no material effect on the market, and it is completely irrelevant to the question whether CLECs are impaired without UNE access to ILEC high-capacity facilities.

2. Like their mischaracterizations of the evidence in the record regarding ILEC special access offerings, CompTel/ASCENT offer an utterly unsupported view of the evidence regarding CLEC self-deployment. CompTel/ASCENT assert that ILECs' reliance on special access offerings is motivated by an "understand[ing] that they cannot demonstrate that competitive carriers can self-supply high capacity loops and transport on most routes."[18] That broad, unfocused, and unsupported assertion is simply untrue. As SBC and others have demonstrated, competitive carriers have deployed tens of thousands of route miles of local fiber, and they have used that fiber to light tens of thousands of

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[14] *See* Ex Parte Letter of C. Frederick Beckner, III, on behalf of AT&T, to Marlene H. Dortch, FCC, WC Docket No. 04-313 and CC Docket No. 01-338, at 11 (Nov. 8, 2004).

[15] *Triennial Review Order* ¶ 128.

[16] *See* AT&T, *Transport UNEs Are a Prerequisite for the Development of Facilities-Based Local Competition* at 10 (Oct. 7, 2002) (attached to Ex Parte Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Oct. 8, 2002) (admitting that 98% of DS1 circuits that AT&T purchases to serve local customers are purchased as special access); *see also* SBC Reply Comments at 48-49.

[17] *See* CompTel/ASCENT Letter at 4.

[18] *Id.* at 1.

buildings. They have done so, moreover, at capacities as low as a single DS1, and they routinely do so to serve a single DS3.[19] Competitive carriers provide over 40% of *all* high capacity services in SBC's territory, and they serve more than a third of the *wholesale* market for DS1 and DS3 services. All but ten of the top 150 MSAs are now served by at least one competitive fiber network, and the top 50 MSAs have an average of *19* competitive networks. Additionally, 3 or more alternate providers have deployed competitive fiber in over 50% of the wire centers with 15K or more business lines. Indeed, by their own admission, CLECs' fiber deployment includes, among others:

AT&T – 21,000 local route miles in 70 MSAs
Time Warner Telecom – 12,247 local route miles in 41 MSAs
XO – 23,800 total route miles in 34 MSAs
MCI – 9,000 local route miles in 63 MSAs
Cox – 6,600 total route miles in 23 MSAs

Contrary to CompTel/ASCENT's apparent understanding, special access is relevant to the inquiry not because CLECs can use it to meet *all* of their high-capacity transmission needs – although, as the evidence shows, they can – but rather because they can use it to complement their already extensive networks. Thus, for example, a carrier that has deployed a fiber ring in a given MSA, but has not yet lit a particular building, can use special access to obtain access to a customer in that building, unless and until it decides to provide its own facilities into the building.[20] That is the basic model that CLECs are using today in the enterprise market, and they are proving themselves overwhelmingly successful in doing so. The suggestion that the Commission should *ignore* that fact, by ignoring special access altogether, is tantamount to the suggestion that the Commission should turn a blind eye to the evidence in the record about how CLECs actually compete. As the D.C. Circuit has made undeniably clear, the Commission can do no such thing: "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . *precludes* a finding that the CLECs are 'impaired' by lack of access to the element."[21]

3. Finally, CompTel/ASCENT proffer a study that purports to predict that, unless the Commission orders unlimited UNE access to DS1 and DS3 loops and transport, American businesses will lose $130 billion and 426,000 jobs over the next ten years. These biased estimates, however, are refuted by a recent United States Chamber of Commerce study entitled "Sending the Right Signals: Promoting Competition Through Telecommunications Reform," which outlines the benefits of eliminating excessive unbundling.[22] According to this study, the recommended reforms, including phasing out mandatory network sharing rules and exempting cable modem and DSL services from common carrier regulation, were estimated to result in $58 billion in new capital

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[19] *See* SBC Reply at 31-32; Alexander/Sparks Decl. ¶ 21 (Att. B to SBC Reply)

[20] *See* Fact Report § I.B, III-39-40.

[21] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 593 (D.C. Cir.) ("*USTA II*") (emphasis added).

[22] Report to the U.S. Chamber of Commerce, *Sending the Right Signals: Promoting Competition Through Telecommunications Reform* (Sept. 22, 2004), *attached to* BellSouth Reply at Appendix, Tab 5.

investments and 212,000 new jobs over five years. The potential benefits of ending excessive unbundling requirements, as noted in the Chamber of Commerce Report, are enormous. That study, moreover, is backed by businesses – *i.e.*, the same businesses that will sell the materials that are used in the marketplace and that will purchase the enterprise services that are at issue here. These businesses, in short, "stand to gain [from] an expanding market" and accordingly "have the incentive to make a completely unbiased judgment on the matter."[23] The Commission would be well served to listen to that judgment, rather than the self-serving claims of CLECs drawn by the allure of deeply discounted wholesale services and, as a result, inflated profit margins.

Sincerely,

/s/ Thomas F. Hughes

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[23] *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).